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In the
Supreme Court of the United States

OCTOBER TERM, 1982

A. S. HORNER, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Does the failure of a party to request review by the National Labor Relations Board (NLRB herein) of a decision issued by one of its regional directors waive the right to obtain judicial review under 29 U.S.C. § 160(e) and (f) where the issues have been fully litigated before the Agency?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
1. **The Decision Below Raises Significant and Recurring Problems Concerning the Standards for Judicial Review of Fact Under § 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. § 160(e) and (f)**	5
2. **The Decision Below Conflicts With Other Courts Of Appeals Concerning the Right to Obtain Judicial Review Under 29 U.S.C. § 160 (e) and (f)**	10
CONCLUSION	12
APPENDIX	A-1

TABLE OF AUTHORITIES

	Page
CASES	
AMCAR Division, ACF Industries v. NLRB, 596 F.2d 1344 (8th Cir. 1979)	11
American Federation of Labor v. NLRB, 308 U.S. 401 (1940)	7
Consolidated Freightways v. NLRB, 669 F.2d 790 (D.C. Cir. 1981)	11
Lake City Foundry Co. v. NLRB, 432 F.2d 1162 (7th Cir. 1970)	12
Magnesium Casting Co. v. NLRB, 401 U.S. 137 (1971)	5,6
NLRB v. Annapolis Emergency Hospital Assn., 561 F.2d 524 (4th Cir. 1977)	11
NLRB v. Blake Construction Co., 663 F.2d 272 (D.C. Cir. 1981)	11
NLRB v. Brown, 380 U.S. 278 (1965)	9
NLRB v. Capital Bakers, Inc., 351 F.2d 45 (3rd Cir. 1965)	10
NLRB v. Rexall Chemical Co., 370 F.2d 363 (1st Cir. 1967)	11
NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969)	11
Proctor & Gamble Manufacturing Co. v. NLRB, 658 F.2d 968 (4th Cir. 1981) *petition for cert. filed* 50 U.S.L.W. 3984 (U.S. June 3, 1982) (No. 81-2226)	11
St. Elizabeth Community Hospital v. NLRB, 626 F.2d 123 (9th Cir. 1980)	11
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	8

STATUTES

Labor Management Relations Act, 1947:
29 U.S.C. § 153(b) (1976) 2,5
29 U.S.C. § 158(a) (1), (5) (1976) 2,7,10
29 U.S.C. § 159(a) (1976) 2,5
29 U.S.C. § 160(e), (f) (1976) 2,4,8,9,10,11

FEDERAL REGULATIONS

29 C.F.R. § 102.60(a) (1981) 2,6
29 C.F.R. § 102.63 (1981) 2,6
29 C.F.R. § 102.67 (1981) 2,4,5,6,7,8,9
29 C.F.R. § 102.69 (1981) 2,6,7,11

OTHER AUTHORITIES

45 NLRB ANN. REP., Tables 3B, 11 (1980) 5,6,7
3 K. DAVIS, ADMINISTRATIVE LAW TREATISE
§ 20.07
at 97 (1958 and Supp. 1970) 8
Federal Rules of Civil Procedure, Rule No. 1 . 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, A.S. Horner, Inc. (Horner herein) respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit entered on May 26, 1982 and July 13, 1982, respectively.

QUESTION PRESENTED

Does the failure of a party to request review by the National Labor Relations Board (NLRB herein) of a decision issued by one of its regional directors waive the right to obtain judicial review under 29 U.S.C. § 160 (e) and (f) where the issues have been fully litigated before the Agency?

OPINIONS BELOW

The Opinion of the Court of Appeals, in a decision not for routine publication, and the Decision of the National Labor Relations Board, 246 NLRB 393 (1979), appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on July 13, 1982. A timely petition for rehearing was denied on September 7, 1982, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this application are:

Statutes:

29 U.S.C. § 153(b) (1976)
29 U.S.C. § 158(a) (1), (5) (1976)
29 U.S.C. § 159(a) (1976)
29 U.S.C. § 160(e), (f) (1976)

Regulations:

29 C.F.R. § 102.60 (a) (1981)
29 C.F.R. § 102.63 (1981)
29 C.F.R. § 102.67 (1981)
29 C.F.R. § 102.69 (1981)

The text of these statutes and regulations is somewhat lengthy and is set forth in the appendix.

STATEMENT OF THE CASE

Horner is a New Mexico corporation which performs highway, heavy and light engineering construction. R. 13-15. Horner employs workers in various construction crafts and has voluntarily extended recognition to the International Union of Operating Engineers, Local 953 as the collective bargaining representative of employees operating heavy construction equipment. On July 21, 1978 the New Mexico District Council of Carpenters, a craft union, filed an election petition with the Albuquerque, New Mexico office of the NLRB. R. 69. The Union sought to represent persons employed as carpenters, iron workers, laborers, truck drivers, and cement masons employed at one of Horner's projects in New Mexico. R. 69.

On August 1, 1978 the Regional Director conducted a hearing at which Horner appeared and objected to the designation of a single project unit as appropriate. Horner further objected to the appropriateness of the proposed multicraft unit as opposed to units drawn along craft lines and submitted its evidence bearing on the issue. The evidence showed that historical practice in the industry and the area required a unit restricted along craft lines. Horner presented other evidence pointing to the inappropriateness of a multicraft unit. Post-hearing briefs were submitted to the Regional Director, in which Horner argued that the multicraft unit was inappropriate for purposes of collective bargaining.

On August 23, 1978 the Regional Director issued his Decision and Direction of Election in which he found that the single project unit was inappropriate and ordered an election in a statewide unit. However, he sustained the designation of a multicraft unit concluding that there existed a community of interest between the employees designated in the petition.

An election in the multicraft unit was conducted on September 22, 1978. A majority of valid votes were cast in favor of the Union.

Horner filed timely objections to the election. In its objections Horner reiterated its position that a multicraft bargaining unit was inappropriate. R. 84. On November 14, 1978 the Regional Director issued his Supplemental Decision on Objections to Conduct Affecting Results of Election and Certificate of

Representative. The Regional Director overruled Horner's objection that the bargaining unit was inappropriate soley on the basis that Horner had waived the objection by failing to request review under 29 C.F.R. § 102.67(c). R. 97-98.

Horner subsequently filed a request for review of the Regional Director's Supplemental Decison. R. 102. On January 16, 1979 the Board denied the request for review stating that the request for review failed to raise "substantial issues warranting review." Thereafter, Horner refused to bargain with the District Council, unfair labor practice charges were filed, an NLRB complaint issued, and the General Counsel moved for summary judgment. Horner's response to the motion for summary judgment reiterated its position that the bargaining unit was inappropriate. R. 260.

On November 8, 1979 the Board issued its Decision and Order which granted the General Counsel's motion for summary judgment. The Board found that the issues raised by Horner had previously been litigated in the representation proceeding, and adopted the Regional Director's previous Decision finding that "Respondent's failure to contest the Regional Director's unit determination...through the request for review procedure constituted a waiver of its right to appeal that in a subsequent proceeding." R. 293. Thereafter, Horner sought judicial review by filing its petition for review under § 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), with the United States Court of Appeals for the Tenth Circuit. In its brief before the Tenth Circuit, Horner argued, *inter alia*, that the Regional Director's finding that a multicraft unit was appropriate was arbitrary, an abuse of discretion, not supported by substantial evidence and not supported by NLRB precedent. Horner further argued that the Regional Director's Decision failed to set forth sufficient findings of fact to support his unit determination in order to permit proper court review, and that the case should be remanded to the Board for findings in order to permit such review. The Board cross-petitioned for enforcement of its Order.

The Tenth Circuit denied Horner's petition for review and granted the Board's cross-petition for enforcement. With respect to the bargaining unit issue the court agreed with Horner that the Regional Director had failed to set forth sufficient findings of fact supporting his unit determination to

allow review. However, the court declined to remand the case for proper findings because the court noted that there was no requirement that the Board make a determination independent from the Regional Director of the appropriate bargaining unit. Nevertheless, the court determined that Horner had waived its right to obtain court review by failing to request review of the Regional Director's Decision issued after the hearing. While expressly recognizing that the waiver rule as applied by it may "produce a harsh result," the court concluded that due process did not require that it consider Horner's position that the unit was inappropriate because of Horner's failure to request review in the first instance.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Significant and Recurring Problems Concerning the Standards for Judicial Review of Fact Under § 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. § 160(e) and (f).

A precise understanding of the NLRB procedural regulations is crucial to understanding why the writ should issue.

In order to accommodate the substantial volume of cases filed with the NLRB year after year, authority to process election and unfair labor practice cases has been delegated to the Board's regional directors.[1] This authority includes the authority to conduct elections under § 9(a) of the Act, 29 U.S.C. § 159(a), and to determine in individual cases the unit in which collective bargaining is appropriate. 29 U.S.C. § 153(b). *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971). Decisions of the regional directors with respect to unit determinations are subject only to discretionary review by the Board. 29 C.F.R. § 102.67(c). This court has held that plenary review of a regional director's unit determination is not required by the statute. *Magnesium Casting Co.*, 401 U.S. 137.

1. During the fiscal year that ended September 30, 1980 the NLRB handled some 8,350 election cases involving some 536,914 employees. 45 NLRB ANN. REP., Table 11 (1980)

Pursuant to its statutory authority, the NLRB has adopted regulations which establish procedures for processing both election and unfair labor practice cases. Election cases are initiated by filing an election petition with an appropriate regional director. 29 C.F.R § 102.60(a). Absent agreement, the regional director investigates the petition and, after issuing an appropriate notice, schedules a hearing on the petition. 29 C.F.R. § 102.63. Issues which may be heard under this procedure include whether the unit designated in the petition is appropriate for purposes of collective bargaining. 29 C.F.R. § 102.67. Parties to the proceedings are permitted to file post-hearing briefs with the regional director on issues raised. 29 C.F.R. § 102.67. After the hearing the regional director is required to set forth his "findings, conclusions, and order or direction." 29 C.F.R. § 102.67(b). The Agency's regulations provide that the regional director's decision is final, subject to any party filing a request for review with the Board. 29 C.F.R. § 102.67(b). Review of the regional director's decision within the categories of review permitted is entirely discretionary with the Board. 29 C.F.R. § 102.67(b); *Magnesium Casting Co.*, 401 U.S. 137.

Of the 1,971 decisions issued by the Board's regional directors during the fiscal year ending September 30, 1980, requests for review were filed in 798 cases. The Board reviewed 101 of these cases, 19 of which resulted in reversal of the regional director's decision. 45 NLRB ANN. REP., Table 3B (1980). Therefore, in less than one percent of the decisions issued by the Board's regional directors in election cases in fiscal year 1980 was a regional director's decision reversed by the Board in its pre-election request for review procedure.

If the regional director finds, after the hearing, that a question concerning representation affecting commerce is raised, the regional director then conducts an election in the unit found to be appropriate. 29 C.F.R. § 102.69(a). Within five days of the date the tally of ballots is delivered to the parties (normally on the date of the election), any party may file objections to the conduct of the election or conduct affecting the results of the election. 29 C.F.R. § 102.69. The regional director then investigates the objections, may conduct a hearing if substantial issues warranting a hearing are raised, and, in cases where the regional director has previously directed an

election, he may exercise his discretion to either (i) issue a report on objections or (ii) issue a decision disposing of the objections or challenges. 20 C.F.R. § 102.69(c). If the regional director through the exercise of his discretion issues a report on objections, the parties have an absolute right to file exceptions to the report, which does not become final until adopted by the Board. 29 C.F.R. § 102.69(c). Under this procedure the decision on objections is issued by the Board itself, after consideration of the record and any exceptions to the report filed by the parties. 29 C.F.R. § 102.69(c). However, if, as occurred below, the regional director exercises his discretion and issues a supplemental decision, a party disagreeing with the regional director's decision must request review under the procedures and standards set forth for requesting review after pre-election hearings. 29 C.F.R. § 102.69 (d).

During fiscal year 1980 the Agency issued 1,710 decisions on objections or challenges. Of these, 535 were issued directly by regional directors. Requests for review of supplemental decisions of regional directors' decisions were filed in 70 cases. Review was granted in only five cases and the Board decided only one case on review, which was affirmed. 45 NLRB ANN. REP., Table 38 (1980). Therefore, during fiscal year 1980, the Board failed to reverse supplemental post-election decisions of its regional directors in a single case where requests for review were sought.

Decisions of the Board in election cases are not ordinarily reviewable at the conclusion of the proceeding. *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940). Under ordinary circumstances an employer seeking judicial review of a decision by a regional director must first refuse to bargain with the union. The Board then issues an unfair labor practice complaint under § 8(a) (1) and (a) (5) of the Act, 29 U.S.C. § 158(a)(1) and (a)(5). The unfair labor practice proceeding does not consider issues which were previously litigated in the election proceeding. 29 C.F.R. § 102.67(f). Similarly, parties are prohibited from raising in the subsequent unfair labor practice proceeding any issue which was in fact the subject of a request for review which was denied. *Id.* Unless extraordinary circumstances or newly discovered evidence is presented, the record in the unfair labor practice case is therefore identical to the record established in the election case.

Ordinarily, after the unfair labor practice case is at issue, the Agency through its General Counsel moves to transfer the case to Washington, and moves for summary judgment on the theory that all matters raised in the unfair labor practice proceeding have already been determined in the election case. The Board routinely grants the motion and issues its order to bargain upon request. At this point for the first time the party aggrieved by an adverse decision in the election case may seek court review. Court review is restricted by statute to objections raised "before the Board, its member, agent, or agency...unless excused by extraordinary circumstances." 29 U.S.C. § 160(e).

As noted above, the decision as to whether to grant review even where the regulations suggest review is appropriate, is entirely discretionary with the Agency. Moreover, the standard for review of *fact* within these criteria requires the Board to determine that "the regional director's decision on a substantial factual issue is *clearly erroneous* on the record." 29 C.F.R. § 102.67(c) (2). Court review under 29 U.S.C. § 160(e) on the other hand, requires review based on "*substantial evidence* on the record considered as a whole." Congress specifically rejected a "clearly erroneous" standard for review under 29 U.S.C. § 160(e) in favor of the more liberal "substantial evidence" standard. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951),

The effect of the Tenth Circuit's decision, then, is to require that parties request review before the Board in order to obtain subsequent court review even in circumstances where it would be futile to do so because the decision did not satisfy the clearly erroneous standard, but nevertheless is not supported by substantial evidence. Moreover, as noted above, the possibility of obtaining reversal of the regional director's decision is so statistically remote as to be almost nonexistent.[2] Furthermore, the result reached by the court, as argued by the Agency, is not fairly suggested even by the Board's regulations.

2. Of course, impossibility or improbability of obtaining adequate relief is a well recognized exception to the general exhaustion doctrine. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.07 at 97 (1958 and Supp. 1970).

The regulations do place parties on notice that unless review is requested the decision of the regional director shall be "final" and that the failure to request review or the denial of a request precludes the party from raising the issue in a "subsequent unfair labor practice proceeding." 29 C.F.R. § 102.67(b) and (d). However, the regulations and the statute do not suggest that the failure to request review precludes future *court review* on the evidentiary record made at the time the issues are fully litigated before the regional director. The statute requires only that the issue be raised before the "Board, its member, agent, or agency." 29 U.S.C. § 160(e).

As noted above, the lower court, while noting that the "waiver rule may produce a harsh result" and agreeing with Horner that the Regional Director's Decision "failed to set forth sufficient findings of fact supporting his unit determination," declined to remand solely because Horner had waived its right to obtain court review. Therefore, the court upheld the Regional Director's Decision without considering whether the decision was supported by substantial evidence in the record before it. In so doing the court failed to discharge its statutory obligation under § 10(e) to review fact based on substantial evidence in the record where issues have been presented to the "Board or its agent." It also abdicated its responsibility to review Agency decision making in a manner which this Court has previously found improper:

> Reviewing courts are not obligated to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional mandate underlying a statute. Such review is always properly within the judicial provence, and the courts would abdicate their responsibility if they did not fully review such administrative decisions.

NLRB v. Brown, 380 U.S. 278, 293 (1965).

The court found that the Regional Director failed to make the proper findings to permit court review, findings which are required by both statute and regulation. 29 U.S.C. § 160(e); 29 C.F.R. § 102.67(b) ("A decision by the regional director upon the record shall set forth his findings..."). All that was required was a remand to the Agency for findings which proper-

ly should have been made in the first instance by the Regional Director.

2. The Decision Below, Conflicts With other Courts Of Appeals Concerning the Right To Obtain Judicial Review Under 29 U.S.C. § 160(e) And (f).

It is clear from a close reading of the cases that the Tenth Circuit is imposing a much stricter standard for judicial review of Board decision making than has been imposed by other circuits which have considered the issue. The effect is to impose more time consuming and expensive procedural preconditions to judicial review in NLRB cases than have been required by other circuits. In all instances parties in the geographic area encompassed by the Tenth Circuit must request review by the Board, even where to do so would be futile. As noted above, this requirement conflicts with requirements of § 160(e) requiring only that issues be raised before the Board or its agent.

The decision conflicts with the Third Circuit's decision in *NLRB v. Capital Bakers, Inc.*, 351 F.2d 45 (3rd Cir. 1965), where the Board had found the employer violated § 8(a)(1) and (5) of the Act by refusing to bargain with the union in one of four of the employer's plants after the Board found each plant individually was an appropriate bargaining unit. Like Horner, the employer in *Capital Bakers* appeared at the hearing and contested the appropriateness of the single plant unit. The regional director decided the unit question adversely to the employer. The employer did not request review. As did Horner, the employer filed a post-election request for review which was denied. As did Horner, the employer contended in the subsequent unfair labor practice proceeding that the unit was inappropriate. Like Horner, the employer argued before the court that the bargaining unit was inappropriate and contrary to the requirements of the National Labor Relations Act. The Third Circuit held that the employer was not barred from raising the unit question since this question had been raised from the inception of the proceeding[3] and the Board was adequately apprised of the employer's intention to rely on its objections to the unit determination. 351 F.2d at 48.

[3] Horner raised its objections to the appropriateness of the multicraft unit with the Board's hearing officer on August 1, 1978, only eleven days after the petition was filed.

The decision also conflicts with the Ninth Circuit's decision in *St. Elizabeth Community Hospital v. NLRB*, 626 F.2d 123 (9th Cir. 1980), where the employer failed to raise the jurisdictional issue with the regional director before the election or in post-hearing objections. In *St. Elizabeth Community Hospital* the court rejected the Board's contention that § 10(e) precluded court review. 626 F.2d at 125.

In addition, the decision below is disturbing in that it indicates that the Tenth Circuit is continuing to rely on its decision in *NLRB v. Thompson Transport Co.*, 406 F.2d 698 (10th Cir. 1969), where the request for review procedure was in fact used by the employer immediately after the initial hearing, but no post-election "objections"[4] were filed to the regional director's report and the court concluded that this failure precluded court review even though the issue had been presented to the regional director during the pre-election hearing and review had been requested. 406 F.2d at 701, 702 citing *NLRB v. Rexall Chemical Co.*, 370 F.2d 363 (1st Cir. 1967). Moreover, the decision below and *Thompson Transport* conflict with other decisions in the circuits which have considered the issue. *See, e.g., Consolidated Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981) (§ 10(e) is satisfied where objections were sufficiently specific to put the Board on notice that the issue may be pursued on appeal); *Proctor & Gamble Manufacturing Co. V. NLRB*, 658 F.2d 968, 988 (4th Cir. 1981) *petition for cert. filed* 50 U.S.L.W. 3984 (U.S. June 3, 1982) (No. 81-2226) (§ 10(e) requirements are satisfied where the matter has been briefed and argued before the Board prior to court enforcement proceedings); *NLRB v. Blake Construction Co.*, 663 F.2d 272, 284 (D.C. Cir. 1981) (§ 10(e) does not require "a triumph of technical pleading over fundamental fairness."); *AMCAR Division, ACF Industries v. NLRB*, 596 F.2d 1344, 1350 n. 8 (8th Cir. 1979) (issue preserved for review where exceptions not filed but issue was implicitly raised at every step of proceeding); *NLRB v. Annapolis Emergency Hospital Assn.*, 561 F.2d 524 (4th Cir. 1977) (§ 10(e) does not bar court consideration of issue where (1) the purpose of § 10 (e) was fully

[4] The regulations do not provide for "objections" to regional directors' reports. Rather "exceptions" or a request for review is appropriate, depending on whether the regional director issues a report or a decision. 29 C.F.R. § 102.69(c).

served because a decision over which review was sought originated with the Board; (2) issue was raised in administrative proceeding; and (3) Board's error was a purely legal one); *Lake City Foundary Co. v. NLRB*, 432 F.2d 1162, 1182 (7th Cir. 1970) (purpose of § 10(e) is to afford Board an opportunity to pass on issue as a prerequisite to court review; exceptions to examiner's report adequate to preserve review under § 10(e)).

Furthermore, the position taken by the Court of Appeals conflicts with the entire trend of modern rules of procedure which favor consideration of disputes on the merits in order to permit substantial justice. *Cf.* Fed. R. Civ. P. 1. In light of the different positions taken by the courts of appeals on issues raised by this application, Horner submits that review is appropriate.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Tenth Circuit.

Respectfully submitted,

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